UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

RODERICK CARROLL, Plaintiff, vs. JO ANNE B. BARNHART, Commissioner of Social Security, Defendant.	No. C02-4036-MWB **REPORT AND RECOMMENDATION**

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I. INTRODUCTION

The plaintiff Roderick Carroll ("Carroll") appeals a decision by an administrative law judge ("ALJ") denying him Title II disability insurance ("DI") benefits and Title XVI supplemental security income ("SSI") benefits. Carroll argues the ALJ erred in (1) failing to fully develop the record; (2) rejecting the opinion of an examining physician in favor of the opinion of a non-examining, non-treating physician; and (3) failing to pose an appropriate hypothetical question to the vocational expert. Carroll argues that because of these errors, the Record does not contain substantial evidence to support the ALJ's decision. (*See* Doc. No. 11)

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

On January 28, 1997, Carroll filed applications for DI and SSI benefits, alleging a disability onset date of December 15, 1996. (R. 93-95, 210-12) The applications were denied initially (R. 64, 66-70, 213), and on reconsideration (R. 65, 73-77, 214). On November 5, 1997, Carroll requested a hearing (R. 78), and a hearing was held before ALJ Jan E. Dutton in Sioux City, Iowa, on December 8, 1998.[1] (R. 29-63) Carroll was

[1]The hearing originally was scheduled for an earlier date, but Carroll appeared and asked that the hearing be rescheduled because he was going to hire an attorney. He appeared at the hearing on December 8, 1998, without an attorney, and waived representation. (R. 31-32, 92)

not represented at the hearing. Carroll testified at the hearing, as did Vocational Expert ("VE") William B. Tucker.

On March 29, 1999, the ALJ ruled Carroll was not entitled to benefits. (R. 9-24) On May 17, 1999, Carroll requested review of the ALJ's decision. (R. 8) On April 19, 2002, the Appeals Council of the Social Security Administration denied Carroll's request for review (R. 5-6), making the ALJ's decision the final decision of the Commissioner.

Carroll filed a timely Complaint in this court on May 23, 2002, seeking judicial review of the ALJ's ruling. (Doc. No. 3) In accordance with Administrative Order #1447, dated September 20, 1999, this matter was referred to the undersigned United States Magistrate Judge, pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition of Carroll's claim. Carroll filed a brief supporting his claim on January 9, 2003. (Doc. No. 11) The Commissioner filed a responsive brief on February 18, 2003. (Doc. No. 11). The matter is now fully submitted, and pursuant to 42 U.S.C. § 405(g), the court turns to a review of Carroll's claim for benefits.

B. Factual Background

1. Introductory facts and Carroll's daily activities

At the time of the hearing, Carroll was 43 years old. (R. 37) He had no permanent place of residence, but sometimes he stayed with friends in Sioux City, Iowa. (R. 36) He had completed high school in Colorado, and one year of college at the University of Colorado in Boulder. (R. 38)

Carroll has never been married. Before 1986, he moved to Iowa to work in a packing plant, but he did not work consistently because he "just was never cut out for doing packing house work." (R. 39) In 1996, he was working as a Certified Nurse's Assistant in Sergeant Bluff, Iowa, when he injured his back. (R. 39-40) He testified this

was a recurring problem that had plagued him for a number of years, and explained his spotty work history. (R. 41-44) He testified that for the seven years preceding the ALJ hearing, he had not been to a doctor for treatment of his back. (R. 44) He explained that when his back would "go out," rather than seeking medical attention, he would take off work for extended periods of time to treat the problem. (R. 44) He then mentioned he recently had seen a neurologist, Dr. Thomas Clark, through a neighborhood health clinic, and the doctor had prescribed Naprosyn and Lodine for back pain. (R. 45-46) Carroll took samples of the medication provided by Dr. Clark, but then stopped taking the medication because it had not helped significantly, and because he could not afford to fill the prescriptions. According to Carroll, Dr. Clark also prescribed physical therapy, but Carroll did not go because of the cost. (R. 46)

The ALJ first indicated she would attempt to obtain Dr. Clark's records. (R. 34, 61) Later, the ALJ asked Carroll if he would be willing to deliver a release to Dr. Clark, and ask the doctor to mail his records directly to the ALJ. (R. 62) Carroll agreed to do so. (*Id.*) The ALJ stated, "I cannot make a decision until I get the record in, so that's why if we can avoid the delay, that would be the best." (*Id.*) In her opinion denying benefits, the ALJ stated, "[A]lthough the Claimant agreed to submit records from Dr. Clark subsequent the hearing, he had failed to do so." (R. 19)[2]

When asked by the ALJ about his ability to engage in physical activities, Carroll indicated he can walk only for short distances, and he is limited in his ability to lift heavy objects because of back pain. (R. 48-52) He also testified he can stand for only about 15 minutes at a time, and can sit for 25 or 30 minutes at a time. (R. 50)

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[2]Of course, this was not accurate. Carroll agreed to provide a release to Dr. Clark, and to ask the doctor to send the records to the ALJ. There is nothing in the record to suggest that Carroll did not do that. Carroll never agreed to submit Dr. Clark's records to the ALJ.

Carroll testified his daily routine consists of sleeping, watching television and videos, and listening to music. (R. 52-53) He does no housework, but he can drive a car. (R. 53)

In interrogatories answered on November 23, 1998, Carroll stated he cannot work because of "difficulty in moving around & sitting for extended periods of time – 1/2 hr to 45 min. maximum." (R. 179) He stated he is prevented from working because of "pain and limited range of motion." (*Id.*) He indicated his pain is in his lower back and left hip, and he has numbness in his right leg and right big toe. (R. 180) He stated the pain is constant, intensifying or lessening with movement and exertion. (*Id.*) He also stated he had seen Thomas Clark, D.O., of Independent Neurologic Consultants in Sioux City, Iowa (R. 181), who had prescribed physical therapy. Carroll did not go to physical therapy because of a lack of resources. (*Id.*) Carroll stated Dr. Clark had prescribed Naprosyn and Lodine, but Carroll was having problems affording the prescriptions. (R. 180)

2. Carroll's medical history

The earliest medical record is a report by Douglas W. Martin, M.D., of a physical examination for Disability Determination Services ("DDS") on February 28, 1997. (R. 187-89) Carroll told Dr. Martin he has had back problems for ten years, presumably caused by a history of weight lifting activities. He reported no history of diagnostic imaging, medical treatment, medication, or physical therapy. He complained of back pain on the right side that gave him trouble with movement, and which required him to use a cane. He stated the pain in his back would wax and wane, and he would be able to work for a few days, and then would have to take off a couple of days when the pain in his back would flare up.

On examination, Carroll demonstrated "a little bit of palpable discomfort" in the anterior aspect of his deltoid musculature on the right. He also was guarded with respect to motion of the hips and knees. Dr. Martin noted that Carroll "has complaints of excruciating back pain with straight leg raising but no radicular patterns are noted." He had no range of motion of the lumbar spine, and an examination of the back revealed "moderate to severe degree of spasm of the left paralumbar areas." Dr. Martin was unable to make a diagnosis based on the information available,[3] and he concluded Carroll had not received adequate treatment. Dr. Martin concluded with the following:

> [G]iven his current situation he is gong to have a lot of difficulties with respect to his work activities. With respect to lifting and carrying he probably would only be able to do very negligible weight, between five and ten pounds, occasionally. With respect to standing, moving about, walking or sitting in an eight hour work day, I think sitting would have to be limited to two to four hours and then he would have to have frequent breaks in order to move around. I would not want him involved in standing activities more than two hours during the work day as well. With respect to moving about or walking, this will be very difficult for him given the current situation. Given the current situation it appears as though that he will not be able to be involved in stooping, climbing, kneeling or crawling activities or with activities where he would have to drive for prolonged periods. With respect to handling objects, seeing, hearing, speaking or with issues concerning exposures in the work environment such as exposures to dust, fumes, temperatures or hazards[,] I do not have any particular concern.

(R. 189)

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[3]Dr. Martin noted Carroll told him his disk problems were discovered from a review of an X-ray. (R. 87) Dr. Martin stated, "[O]ne cannot make a diagnosis of a disk disease on a plane [sic] film X-ray." (R. 188)

DDS then referred Carroll to St. Luke's Rehabilitation Services. (R. 192-95) On April 28, 1997, Carroll was examined at St. Luke's. His trunk range of motion was minimal, and he could not stand without a cane. He also demonstrated poor sitting tolerance. Carroll's "problems" were diagnosed as "decreased flexibility in the lumbosacral region" and "a grave concern of reinjury and increase in his low back pain."

Carroll saw Dr. Martin again on May 20, 1997. Dr. Martin's assessment was "chronic back pain." He concluded Carroll's condition was unchanged since his last visit. He stated, "I continue to be of the opinion that this gentleman needs to get treated for this which would include physical therapy and medications to begin with. It is unknown whether the gentleman actually may have a disk problem but that certainly could be a possibility." (R. 197)

On June 17, 1997, James W. Ryan, M.D. completed a Residual Physical Functional Capacity Assessment form for Carroll. (R. 198-205) Dr. Ryan concluded Carroll could occasionally lift or carry 20 pounds, frequently lift or carry 10 pounds, and sit, stand, or walk about six hours in an eight-hour workday. He also concluded Carroll's ability to push or pull was unlimited. He found Carroll could balance frequently, and could climb, stoop, kneel, crouch, and crawl occasionally. He found no other limitations. In a supplemental report, Dr. Ryan summarize the same brief medical history given above, and concluded, "Based on subjective information as well as his history of pain and considering the lack of professional advice of the last 5 years, it appears that a light RFC with limitation of stooping, kneeling, crouching and crawling is appropriate." (R. 206-07)

On June 24, 1997, Maurice F. Perll, M.D. issued a report stating he agreed with Dr. Ryan's assessment. (R. 208-09)

3. Vocational Expert's Testimony

The ALJ asked the VE about a hypothetical person who is the same age and has the same vocational profile and education as Carroll. (R. 56) The hypothetical person has worked as a nurse assistant, janitor, production helper, and laborer in the meat packing industry. The ALJ asked the VE to assume the following about the hypothetical person:

> First of all, if he is restricted to light exertional work. If he could occasionally lift and carry 20 pounds, could frequently lift or carry 10 pounds. If he could stand or walk for about six hours in an eight hour work day. If he could sit for about six hours in an eight hour work day. If he had no limitations in pushing or pulling. That if he could do postural activities on an occasional basis, climbing, stooping, kneeling, crouching, crawling, balancing, and have no other physical limitations, would he be able to go back to any of his past work?

(R. 57) The VE responded this person would not be able to perform Carroll's past work, and has no transferable skills to skilled, light work. (*Id.*) The VE further concluded the hypothetical person would not be able to perform any light, unskilled work. (*Id.*)

The ALJ next asked the VE about work in a sedentary functional capacity:

> If the claimant needed to have a job that was more of a, a sitting job, say he could only sit, if he could only be on his feet two hours out of an eight hour work shift, but could sit for six hours out of an eight hour work shift, and again, this would be with normal breaks. If he could lift only 10 pounds, and could do the other postural activities on an occasional basis, is there, would that include a full-range of sedentary work or would he be excluded from any kind of sedentary work?

(R. 58) The VE responded "I don't really think there would be exclusions in sedentary work under the conditions of this hypothetical." (*Id.*) The VE listed several light jobs in which the worker is permitted to alternate between standing and sitting. (R. 59)

The VE further testified that if Carroll's testimony were considered to be credible, the VE also would exclude all sedentary work. (R. 58)

4. The ALJ's conclusions

The ALJ noted that after Carroll filed his claims, DDS referred him to Dr. Martin for a consultative comprehensive examination because there was no medical evidence in the record concerning Carroll's condition. (R. 13) Later, DDS referred Carroll to St. Luke's Rehabilitation Services to investigate his complaints about his back. (R. 13-14) The ALJ summarized the results of these examinations (R. 13-15), and then correctly concluded that the evidence supporting Carroll's claim of disability all was dependent on Carroll's credibility. After reviewing the standards for judging the credibility of claimants set forth in the regulations (20 CFR §§ 404.1529 and 416.929) (R. 15-17), and then discussing and applying the *Polaski* standards (*see Polaski v. Heckler,* 739 F.2d 1320, 1322 (8th Cir. 1984), discussed below) (R. 17-20), the ALJ determined that Carroll's complaints of disabling pain were not credible. The ALJ found Carroll was no longer able to perform his past relevant work (R. 20), but he did possess the residual functional capacity to perform various light occupations existing in the regional economy (R. 21).

Based on this finding, the ALJ concluded Carroll was not under a disability as defined in the Social Security Act at any time through the date of the ALJ's decision (*id.*), and therefore is not entitled to DI or SSI benefits. (R. 24)

III. DISABILITY DETERMINATIONS, THE BURDEN OF PROOF, AND THE SUBSTANTIAL EVIDENCE STANDARD

A. Disability Determinations and the Burden of Proof

Section 423(d) of the Social Security Act defines a disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505. A claimant has a disability when the claimant is "not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists . . . in significant numbers either in the region where such individual lives or in several regions of the country." 42 U.S.C. § 432(d)(2)(A).

To determine whether a claimant has a disability within the meaning of the Social Security Act, the Commissioner follows a five-step process outlined in the regulations. 20 C.F.R. §§ 404.1520 & 416.920; *see Kelley v. Callahan*, 133 F.3d 583, 587-88 (8th Cir. 1998) (citing *Ingram v. Chater*, 107 F.3d 598, 600 (8th Cir. 1997)). First, the Commissioner must determine whether the claimant is currently engaged in substantial gainful activity. Second, he looks to see whether the claimant labors under a severe impairment; *i.e.*, "one that significantly limits the claimant's physical or mental ability to perform basic work activities." *Kelley*, 133 F.3d at 587-88. Third, if the claimant does have such an impairment, then the Commissioner must decide whether this impairment meets or equals one of the presumptively disabling impairments listed in the regulations. If the impairment does qualify as a presumptively disabling one, then the claimant is considered disabled, regardless of age, education, or work experience. Fourth, the

Commissioner must examine whether the claimant retains the residual functional capacity to perform past relevant work.

Finally, if the claimant demonstrates the inability to perform past relevant work, then the burden shifts to the Commissioner to prove there are other jobs in the national economy that the claimant can perform, given the claimant's impairments and vocational factors such as age, education and work experience. *Id.*; *accord Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001) ("[I]f the claimant cannot perform the past work, the burden then shifts to the Commissioner to prove that there are other jobs in the national economy that the claimant can perform.") (citing *Cox v. Apfel*, 160 F.3d 1203, 1206 (8th Cir. 1998)).

Step five requires that the Commissioner bear the burden on two particular matters:

> In our circuit it is well settled law that once a claimant demonstrates that he or she is unable to do past relevant work, the burden of proof shifts to the Commissioner to prove, first that the claimant retains the residual functional capacity to do other kinds of work, and, second that other work exists in substantial numbers in the national economy that the claimant is able to do. *McCoy v. Schweiker*, 683 F.2d 1138, 1146-47 (8th Cir. 1982) (*en banc*); *O'Leary v. Schweiker*, 710 F.2d 1334, 1338 (8th Cir. 1983).

Nevland v. Apfel, 204 F.3d 853, 857 (8th Cir. 2000) (emphasis added); *accord Weiler v. Apfel*, 179 F.3d 1107, 1110 (8th Cir. 1999) (analyzing the fifth-step determination in terms of (1) whether there was sufficient medical evidence to support the ALJ's residual functional capacity determination and (2) whether there was sufficient evidence to support the ALJ's conclusion that there were a significant number of jobs in the economy that the claimant could perform with that residual functional capacity); *Fenton v. Apfel*, 149 F.3d 907, 910 (8th Cir. 1998) (describing "the Secretary's two-fold burden" at step five to be, first, to prove the claimant has the residual functional capacity to do other kinds of work,

and second, to demonstrate that jobs are available in the national economy that are realistically suited to the claimant's qualifications and capabilities).

B. The Substantial Evidence Standard

Governing precedent in the Eighth Circuit requires this court to affirm the ALJ's findings if they are supported by substantial evidence in the record as a whole. *Krogmeier v. Barnhart*, 294 F.3d 1019, 1022 (8th Cir. 2002) (citing *Prosch v. Apfel*, 201 F.3d 1010, 1012 (8th Cir. 2000)); *Weiler, supra,* 179 F.3d at 1109 (citing *Pierce v. Apfel*, 173 F.3d 704, 706 (8th Cir. 1999)); *Kelley, supra,* 133 F.3d at 587 (citing *Matthews v. Bowen*, 879 F.2d 422, 423-24 (8th Cir. 1989)); 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . . ."). Under this standard, "[s]ubstantial evidence is less than a preponderance but is enough that a reasonable mind would find it adequate to support the Commissioner's conclusion." *Krogmeier, id.*; *Weiler, id.*; *accord Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001) (citing *Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000)); *Hutton v. Apfel*, 175 F.3d 651, 654 (8th Cir. 1999); *Woolf v. Shalala*, 3 F.3d 1210, 1213 (8th Cir. 1993).

Moreover, substantial evidence "on the record as a whole" requires consideration of the record in its entirety, taking into account both "evidence that detracts from the Commissioner's decision as well as evidence that supports it." *Krogmeier,* 294 F.3d at 1022 (citing *Craig*, 212 F.3d at 436); *Willcuts v. Apfel*, 143 F.3d 1134, 1136 (8th Cir. 1998) (quoting *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, 71 S. Ct. 456, 464, 95 L. Ed. 456 (1951)); *Gowell, id.; Hutton*, 175 F.3d at 654 (citing *Woolf*, 3 F.3d at 1213); *Kelley*, 133 F.3d at 587 (citing *Cline v. Sullivan*, 939 F.2d 560, 564 (8th Cir. 1991)).

In evaluating the evidence in an appeal of a denial of benefits, the court must apply a balancing test to assess any contradictory evidence. *Sobania v. Secretary of Health & Human Serv.*, 879 F.2d 441, 444 (8th Cir. 1989) (citing *Steadman v. S.E.C.*, 450 U.S. 91, 99, 101 S. Ct. 999, 1006, 67 L. Ed. 2d 69 (1981)). The court, however, does "not reweigh the evidence or review the factual record *de novo*." *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996) (quoting *Naber v. Shalala*, 22 F.3d 186, 188 (8th Cir. 1994)). Instead, if, after reviewing the evidence, the court finds it "possible to draw two inconsistent positions from the evidence and one of those positions represents the agency's findings, [the court] must affirm the [Commissioner's] decision." *Id.* (quoting *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992), and citing *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989)); *see Hall v. Chater*, 109 F.3d 1255, 1258 (8th Cir. 1997) (citing *Roe v. Chater*, 92 F.3d 672, 675 (8th Cir. 1996)). This is true even in cases where the court "might have weighed the evidence differently." *Culbertson v. Shalala*, 30 F.3d 934, 939 (8th Cir. 1994) (citing *Browning v. Sullivan*, 958 F.2d 817, 822 (8th Cir. 1992)); *accord Krogmeier,* 294 F.3d at 1022 (citing *Woolf*, 3 F.3d at 1213). The court may not reverse "the Commissioner's decision merely because of the existence of substantial evidence supporting a different outcome." *Spradling v. Chater*, 126 F.3d 1072, 1074 (8th Cir. 1997); *accord Pearsall,* 274 F.3d at 1217; *Gowell, supra*.

On the issue of an ALJ's determination that a claimant's subjective complaints lack credibility, the Sixth and Seventh Circuits have held an ALJ's credibility determinations are entitled to considerable weight. *See, e.g., Young v. Secretary of H.H.S.,* 957 F.2d 386, 392 (7th Cir. 1992) (citing *Cheshier v. Bowen,* 831 F.2d 687, 690 (7th Cir. 1987)); *Gooch v. Secretary of H.H.S.,* 833 F.2d 589, 592 (6th Cir. 1987), *cert. denied*, 484 U.S. 1075, 108 S. Ct. 1050, 98 L. Ed. 2d. 1012 (1988); *Hardaway v. Secretary of H.H.S.,* 823 F.2d 922, 928 (6th Cir. 1987). Nonetheless, in the Eighth Circuit, an ALJ may not

discredit a claimant's subjective allegations of pain, discomfort or other disabling limitations simply because there is a lack of objective evidence; instead, the ALJ may only discredit subjective complaints if they are inconsistent with the record as a whole. *See Hinchey v. Shalala,* 29 F.3d 428, 432 (8th Cir. 1994); *see also Bishop v. Sullivan,* 900 F.2d 1259, 1262 (8th Cir. 1990) (citing *Polaski v. Heckler,* 739 F.2d 1320, 1322 (8th Cir. 1984)). As the court explained in *Polaski v. Heckler:*

> The adjudicator must give full consideration to all of the evidence presented relating to subjective complaints, including the claimant's prior work record, and observations by third parties and treating and examining physicians relating to such matters as:
>
> 1) the claimant's daily activities;
> 2) the duration, frequency and intensity of the pain;
> 3) precipitating and aggravating factors;
> 4) dosage, effectiveness and side effects of medication;
> 5) functional restrictions.

Polaski, 739 F.2d 1320, 1322 (8th Cir. 1984). *Accord Ramirez v. Barnhart*, 292 F.3d 576, 580-81 (8th Cir. 2002).

IV. ANALYSIS

A. ALJ's Duty to Fully Develop the Record

Carroll first complains the ALJ failed to fully develop the Record. In particular, Carroll argues the ALJ did not follow up when she had not received records from Carroll's treating physician, Dr. Clark. (*See* Doc. No. 11, p. 4) The Commissioner responds that it is unlikely Dr. Clark, who saw Carroll only one time approximately six weeks before

the hearing, was a "treating physician."[4] The Commissioner further argues that because there is no evidence to establish why Dr. Clark's records are not part of the Record, there is nothing to suggest the ALJ failed to perform any duty owed to Carroll. (*See* Doc. No. 15, p. 13)

At the hearing, the ALJ asked Carroll to contact Dr. Clark about forwarding his records to the ALJ, and Carroll agreed to do so. The ALJ then issued her opinion without having Dr. Clark's records, reciting that Carroll had agreed to provide the records but had failed to do so. Actually, it is not clear from this record why the doctor's records were not sent to the ALJ. It is possible, as concluded by the ALJ, that Carroll never followed up on his promise to deliver the release to Dr. Clark, but it is just as likely that Carroll delivered the release to Dr. Clark and, for some reason, Dr. Clark never sent the records to the ALJ.

In *Cox v. Apfel*, the Eighth Circuit Court of Appeals held, "The ALJ has a duty to develop facts fully and fairly, and this duty is enhanced when the claimant is not

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[4]A "treating physician" is a physician who has "treated the claimant/patient over a number of years." *Kirk v. Secretary*, 667 F.2d 524, 536 (6th Cir. 1981); *see Campbell v. Bowen*, 800 F.2d 1247, 1250 (4th Cir. 1986) ("[T]he opinion of a treating physician is entitled [to] more weight because it reflects a judgment based on a continuing observation over a number of years."); *Mitchell v. Schweiker*, 699 F.2d 185, 187 (4th Cir. 1983) ("While the Secretary is not bound by the opinion of a claimant's treating physician, that opinion is entitled to great weight for it reflects an expert judgment based on a continuing observation of the patient's condition over a prolonged period of time.") To determine whether a physician is a "treating physician," the court must consider the length of the treatment relationship, the frequency of examination, and the nature and extent of the treatment relationship. *See* 20 C.F.R. § 404.1527(d)(2)(I) & (ii); *Henderson v. Sullivan*, 930 F.2d 19, 21 (8th Cir. 1991) ("We have consistently discounted the opinions of non-treating physicians who have seen the patient only once, at the request of the Social Security Administration. There is no reason to treat differently the opinion of a non-treating physician who has seen the patient only once, at the request of the patient or her lawyer."). A physician will be regarded as a "treating physician" only if the physician has seen the patient "a number of times and long enough to obtain a longitudinal picture of [the patient's] impairment." 20 C.F.R. § 404.1527(d)(2)(I); *see*, *e.g.*, *Trossauer v. Chater*, 121 F.3d 341, 344 (8th Cir. 1997) (Doctor "could be expected to be quite familiar with the medical history of a patient he had treated for almost forty years.").

represented by counsel." *Cox v. Apfel*, 160 F.3d 1203, 1209 (8th Cir 1998); *accord Hildebrand v. Barnhart*, 302 F. 3d 836, 838 (8th Cir. 2002). *See also Ventura v. Shalala*, 55 F.3d 900, 901-02 (3d Cir. 1995) (ALJ "has an affirmative obligation to actually assist the claimant in developing the facts").

The Commissioner responds that Carroll had seen Dr. Clark only once, shortly before the hearing. According to Carroll himself, the doctor had prescribed Naprosyn and Lodine, and directed Carroll to go to physical therapy, but Carroll did not follow through on these recommendations. When asked if Dr. Clark had told him what his problem was, Carroll responded, "He, we really didn't discuss the things that were wrong, because I already, I already told him." (R. 46)

While it is true the ALJ had a duty to fully develop the Record, particularly because Carroll was not represented by an attorney, it does not appear from this Record that Dr. Clark would have had any information to assist the ALJ in deciding this case. Dr. Clark examined Carroll one time, and prescribed medication and physical therapy. He ordered no diagnostic tests, and Carroll did not follow his recommendations concerning treatment. There is no indication from this history that Dr. Clark's records would contain anything that would have assisted the ALJ in deciding the case. Thus, even it was error for the ALJ to fail to obtain Dr. Clark's records, the error was harmless.

B. Evidence from a Non-Treating, Non-Examining Physician

Carroll next argues the ALJ incorrectly relied on the opinion of non-examining, non-treating physicians working for DDS, and ignored the opinion of Dr. Martin, who personally examined Carroll for DDS.

The court begins this analysis by noting that the opinions of the non-treating, non-examining physicians, Dr. Ryan and Dr. Perll, are virtually worthless in this case. These

doctors gave opinions on Carroll's residual physical functional capacity that were totally unsupported by anything in the Record, and were, in fact, contrary to the limited evidence available to them.

However, Carroll's contention that the ALJ relied on the opinions of these doctors to discount the opinions of Dr. Martin (*see* Doc. No. 11, p. 5) also is not supported by anything in the Record. In her opinion, the ALJ makes no reference to the opinions of Drs. Ryan and Perll. Instead, she concludes there is "little doubt that many of the limitations cited by Dr. Martin are based on the Claimant's reported limitations and possibly exaggerated pain behavior demonstrated during the consultative evaluation." (R. 19) The ALJ discounted Dr. Martin's opinions based on her conclusion that Carroll was not credible. (*See* R. 19) To support this conclusion, the ALJ conducted a thorough *Polaski* analysis. (*See* R. 17-20)

Furthermore, Carroll overstates what Dr. Martin actually concluded. Although Dr. Martin stated Carroll's ability to work would be severely limited "given his current situation" (R. 189), Dr. Martin also stated he was unable to make a diagnosis because the proper tests had not been performed and Carroll had not received adequate treatment. Dr. Martin's opinions do not provide evidence that Carroll was "disabled" under the Social Security Act.[5]

The ALJ did not err in failing to accept the opinions and conclusions of Dr. Martin, or in failing to find the evidence provided by Dr. Martin established that Carroll was disabled. As discussed below, this does not mean, however, that there was substantial evidence to support the ALJ's decision.

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[5]The ALJ noted, "The Social Security Act defines 'disability' as the inability to engage in any substantial gainful activity due to physical or mental impairment(s) which can be expected to either result in death or last for a continuous period of not less than 12 months." (R. 12-13)

C. Improper Hypothetical Question

Finally, Carroll argues the ALJ did not pose an appropriate hypothetical question to the VE. (*See* Doc. No. 11, pp. 6-9)

The Eighth Circuit has held an ALJ's hypothetical question must fully describe the claimant's abilities and impairments as evidenced in the record. *See Chamberlain v. Shalala*, 47 F.3d 1489, 1495 (8th Cir. 1995) (citing *Shelltrack v. Sullivan*, 938 F.2d 894, 898 (8th Cir. 1991)). A hypothetical question is "sufficient if it sets forth the impairments which are accepted as true by the ALJ." *Johnson v. Chater*, 108 F.3d 178, 180 (8th Cir. 1997); *House v. Shalala*, 34 F.3d 691, 694 (8th Cir. 1994). Only the impairments substantially supported by the record as a whole must be included in the ALJ's hypothetical. *Cruze v. Chater*, 85 F.3d 1320, 1323 (8th Cir. 1996) (citing *Stout v. Shalala*, 988 F.2d 853, 855 (8th Cir. 1993)). If a hypothetical question does not encompass all relevant impairments, the vocational expert's testimony does not constitute substantial evidence to support the ALJ's finding of no disability. *Cruze*, 85 F.3d at 1323 (citing *Hinchey v. Shalala*, 29 F.3d 428, 432 (8th Cir. 1994)). The ALJ may produce evidence of suitable jobs by eliciting testimony from a VE "concerning availability of jobs which a person with the claimant's particular residual functional capacity can perform." *Cox v. Apfel*, 160 F.3d 1203, 1207 (8th Cir. 1998). A "proper hypothetical question presents to the vocational expert a set of limitations that mirror those of the claimant." *Hutton v. Apfel*, 175 F.3d 651, 656 (9th Cir. 1999).

In *Wiekamp v. Apfel*, 116 F. Supp. 2d 1056 (N.D. Iowa 2000), Chief Judge Mark W. Bennett discussed the requirements for a proper hypothetical question posed to a VE:

> "Testimony from a vocational expert is substantial evidence only when the testimony is based on a correctly phrased hypothetical question that captures the concrete consequences of a

> claimant's deficiencies." *Taylor v. Chater*, 118 F.3d 1274, 1278 (8th Cir. 1997). Although "questions posed to vocational experts should precisely set out the claimant's particular physical and mental impairments, . . . a proper hypothetical question is sufficient if it sets forth the impairments which are accepted as true by the ALJ." *House v. Shalala*, 34 F.3d 691, 694 (8th Cir. 1994) (internal citations, quotation marks, and alterations omitted).
>
> *Roberts v. Apfel*, 222 F.3d 466, 471 (8th Cir. 2000). "The hypothetical need not use specific diagnostic terms . . . where other descriptive terms adequately describe the claimant's impairments." *Warburton* [*v. Apfel*], 188 F.3d [1047,] 1050 [(8th Cir. 1999)]. An ALJ is not required to include in a hypothetical question to a vocational expert any impairments that are not supported by the record. *Prosch*, 201 F.3d at 1015. However, where an ALJ improperly rejects the opinion of a treating physician or subjective complaints of pain by the claimant, the vocational expert's testimony that jobs exist for the claimant does not constitute substantial evidence on the record as a whole where the vocational expert's testimony does not reflect the improperly rejected evidence. *See Singh*, 222 F.3d at 453 ("In view of our findings that the ALJ improperly rejected both the opinion of Singh's treating physician and Singh's subjective complaints of pain, we find that the hypothetical question posed to the vocational expert did not adequately reflect Singh's impairments. Accordingly, the testimony of the vocational expert that jobs exist for Singh cannot constitute substantial evidence on the record as a whole.").

Wiekamp, 116 F. Supp. 2d at 1073-74.

In her hypothetical question, the ALJ asked the VE to assume that Carroll could be on his feet for two hours out of an eight-hour work shift; could sit for six hours out of an eight-hour work shift, with normal breaks; and could lift 10 pounds. (R. 58) The

assumption that Carroll could stand for two hours and sit for six hours in an eight-hour day is directly contrary to Carroll's testimony, and also is directly contrary to the opinions of Dr. Martin. Of course, the ALJ decided to reject this evidence, so the ALJ included in her hypothetical question all of the limitations she believed to be credible. However, there nothing in the record to support the ALJ's conclusion that Carroll could stand for two hours and sit for six hours in an eight-hour day.

In step five of the evaluation process outlined in the Social Security regulations, and discussed above, the Commissioner has the burden of proof. There is no medical evidence in this sparse Record to support the ALJ's residual functional capacity determination, or in fact, any RFC determination at all. As Judge Bennett noted in *Scott v. Apfel*, 89 F. Supp. 2d 1066, 1076 (N.D. Iowa 2000), "the question is whether medical evidence already in the record provides a sufficient basis for a decision in favor of the Commissioner." In the present case, the evidence of record does not provide such a basis. The ALJ's decision was based on inadequate evidence and was, as a result, prejudicial to Carroll. *See Onstad v. Shalala*, 999 F.2d 1232, 1234 (8th Cir. 1993) (relevant inquiry is whether claimant "was prejudiced or treated unfairly by how the ALJ did or did not develop the record; absent unfairness or prejudice, we will not remand.") (citing *Phelan v. Bowen*, 846 F.2d 478, 481 (8th Cir. 1988)).

Accordingly, this case should be remanded so the Commissioner can flesh out the record and determine whether Carroll was, in fact, disabled during the relevant period.

V. CONCLUSION

For the reasons discussed above, **IT IS RESPECTFULLY RECOMMENDED**, unless any party files objections[6] to the Report and Recommendation in accordance with 28 U.S.C. § 636 (b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this Report and Recommendation, that this case be remanded to the Commissioner with instructions to fully develop the Record, and to reconsider her decision based on adequate evidence.

IT IS SO ORDERED.

DATED this 25th day of September, 2003.

_____
PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[6]Objections must specify the parts of the report and recommendation to which objections are made. Objections must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).